Office-Supreme Court, U.S.
FILED
AUG 31 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL AND HOUSING AND HOME FINANCE ADMINISTRATOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RODGER J. WALSH,
Floor Three,
Union National Bank Building,
Kansas City 6, Missouri,
Counsel for Petitioner.

LINDE, THOMSON, VAN DYKE, FAIRCHILD & LANGWORTHY,
Floor Three,
Union National Bank Building,
Kansas City 6, Missouri,
Of Counsel.

E. L. MENDENHALL, INC. 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3050

INDEX

Citations to Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes Involved 3
Statement 3
Reasons for Granting the Writ 5
Conclusion 8

Appendix—

Appendix A, Opinion of the United States Court of Appeals for the Eighth Circuit A1
Appendix B, Judgment of the Court of Appeals A9
Appendix C, Statutes Involved A10

Table of Cases

Federal Housing Administration, Region No. 4, v. *Burr,* 309 U.S. 242 ..... 5, 6, 7
Gart v. *Cole,* C.A. N.Y., 263 F.2d 244, 249, Cert. Den. 359 U.S. 978 ..... 6, 7
Peerless Insurance Co. v. *Cerny & Associates, Inc.,* U.S.D.C. Minn., 199 F. Supp. 951 (1961) 7
Snyder v. *Buck,* 340 U.S. 15, 22 6
State v. *Malvaney,* 221 Miss. 190, 72 So.2d 424 (1954) 7

Statutes Cited

12 U.S.C. 1749a (April 20, 1950, c. 94, Title IV, § 402, 64 Stat. 78; 1953 Reorg. Plan No. 1, §5, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631) 3
28 U.S.S. 2679 (June 25, 1948, c. 646, 62 Stat. 984) 3
42 U.S.C. 1494 (August 11, 1955, c. 783, Title II, Section 204, 69 Stat. 644) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

PHOENIX ASSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL AND HOUSING AND HOME FINANCE ADMINISTRATOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Phoenix Assurance Company of New York prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 18, 1962.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and is printed in the certified transcript in the printed record below (R. 181-193). The opinion of the United States Court of Appeals for the Eighth Circuit is printed in Appendix A hereto, *infra*, p. A1; and is reported in ..... F.2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on July 18, 1962, Appendix B, *infra*, page A9. An order staying issuance of the mandate of the Court of Appeals was entered on August 2, 1962, staying the mandate for a period of thirty days from and after August 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED.

1. Whether the Housing and Home Finance Administrator, authorized by Congress to sue or be sued, can be sued in the State of Missouri where he is doing business or is jurisdiction over him limited to where he can be personally served with process?

2. Whether the Housing and Home Finance Administrator can be sued in the State of Missouri if he is doing business there, but not personally served with process, and if he can be sued there is he responsible for losses that he caused by his regulaions while claiming to act as only a lender of Government funds?

3. Whether the petitioner, a corporate surety, is relieved of its obligations under a performance bond on an original contract for the losses that occurred when the Housing and Home Finance Administrator, as a condition of lending public finds, required the City, as borrower, and its contractor to enter into a new contract on Housing and Home Finance Administrator's forms and to agree to new conditions for the performance of the original contract?

STATUTES INVOLVED.

The statutory provisions involved are

42 U.S.C. 1494 (August 11, 1955, c. 783, Title II. Section 204, 69 Stat. 644),

28 U.S.C. 2679 (June 25, 1948, c. 646, 62 Stat. 984),

12 U.S.C. 1749a (April 20, 1950, c. 94, Title IV, § 402, 64 Stat. 78; 1953 Reorg. Plan No. 1, § 5, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631), and

they are printed in Appendix C, *infra*, p. A10.

STATEMENT.

The petitioner, Phoenix Assurance Company of New York, filed a complaint for declaratory relief in the United States District Court for the Western District of Missouri, against the City of Buckner, Missouri, its contractor, William R. Reser, and the Housing and Home Finance Administrator, to determine petitioner's rights and liabilities under a performance bond in the amount of $97,036.85 that it had issued on the original contract between the City and its contractor to construct a sewer (R. 7, 23). The jurisdiction of the district court was invoked because of diversity of citizenship, the petitioner being a New York

corporation and the defendant City a Missouri municipal corporation and the individual defendants were citizens of Missouri; the Housing and Home Finance Administrator was either a federal "corporation" or "agency" or individual. The HHFA attorney said he "resembles an executive department" in his brief in the Court of Appeals.

At the conclusion of the trial in the District Court the HHFA's motion to dismiss (R. 55) on the grounds that Administrator was not personally served in Missouri, or that his employee was not authorized to accept service in Missouri was sustained (R. 5, 185).

After the original contract was made the City did not have funds to proceed with the contract (R. 9, 28, 49) and the HHFA agreed to lend the City $150,000.00 of public funds (R. 72, 84, 141) and as a condition of the loan required the City and its contractor to comply with numerous terms and conditions imposed by the HHFA (R. 85-91, 105-108, 131-139) including the execution of a new contract on the forms of the HHFA.

The HHFA requested a new performance bond on the new contract and the petitioner refused to execute a new bond (R. 33, 44).

Notwithstanding the fact that the City had no funds to perform the contract, the HHFA authorized the City to serve notice on the contractor to proceed with the project (R. 182) although the contractor could not meet his financial obligations (R. 159) and later abandoned the project and thereby caused a loss to the City. The City counterclaimed for the loss and the District Court entered judgment for the City against the petitioner in the amount of $30,180.73 on the theory that petitioner was bound on its bond on the original contract (R. 181).

The petitioner alleged that the HHFA, by requiring the City and its contractor to make a new contract, abrogated and rescinded the original contract and thereby relieved the petitioner-surety of any obligation under its bond; the petitioner also claimed that the HHFA was responsible for the loss that occurred because of his order to proceed with the contract when he knew the contractor was financially unable to perform and a loss would occur.

The Court of Appeals did not decide whether or not the HHFA was properly served but assumed he was and found "his relation to the City was only that of a lender of Government funds and a purchaser of the City's Revenue Bonds" and held the dismissal by the District Court was proper (opinion p. 8, Appendix A, *infra*, p. A8).

The Court of Appeals disposed of petitioner's claim against HHFA, without citation of authority, by stating:

> "The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator (sic) has too inadequate a base to merit discussion." (Opinion, p. 8, Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals in affirming the dismissal of the petitioner's complaint as to the HHFA is in direct conflict with this Court's holding in principle that "* * * when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under like circumstances would be * * *." *Federal Housing Administration, Region No. 4* v. *Burr*, 309 U.S. 242, because the dismissal was based on the erroneous conclusion that even if the HHFA was doing business in Missouri, he

could not be sued there because he was not personally served there.

If the Court of Appeals' holding is the law, then a Federal Administrator can act with impunity in any jurisdiction and can only be sued where he is served personally. Such a holding is directly in conflict with this Court's interpretation of the intent of Congress in using the words "sue and be sued."

2. The question of where a federal administrator may be sued is an important question of federal law which has not been, but should be, settled by this Court. The *Burr* case, *supra*, would indicate that an administrator, since he can "sue and be sued" could be sued anywhere he is doing business, as any other corporation, but the HHFA along with most federal administrators are not corporations as such, and this Court did not decide that specific point in the *Burr* case.

If the Court of Appeals' holding below is correct, then all claimants must sue a federal administrator where he can be served personally which could not be the intent of Congress in enacting the legislation.

3. The decision of the Court of Appeals below is in conflict with the decision of the Court of Appeals for the Second Circuit in the case of *Gart* v. *Cole*, C.A. N.Y., 263 F.2d 244, 249, Cert. Den. 359 U.S. 978; wherein the Second Circuit held that service of process upon the administrator should be determined as in suits against corporations. It noted that, as this Court did in *Snyder* v. *Buck*, 340 U.S. 15, 22, that the determination of the proper party defendant to challenge the action of an administrator is "compounded of confusion and artificialities." The Second Circuit held that the service on the Administrator at his New York office, although not personal service, was

sufficient. The Court below, by affirming the district court, held the service in this case was insufficient because personal service was not had on the Administrator.

The HHFA is the head of a federal agency but exactly what type of legal entity he is, is not clear, except he can sue or be sued. It would appear from the holding of the *Burr* case, *supra,* and the *Gart* case, *supra,* that he can be sued as a corporation, and under the principle of those cases the court below erred in affirming the district court's dismissal on the grounds that the HHFA was not properly served with process.

4. The mere fact that the HHFA lent the City the money to proceed with the project should not relieve him of his responsibility for the losses that occurred due to the City's actions and his engineer's actions in following his regulations. Congress, in granting him his powers, also granted him the liability to be sued without restriction. The court below erroneously allowed him to escape his responsibility on the theory that he was only a money lender. In this case he was more than just a money lender—he controlled the project by his regulations (R. 85-92; 105-108) and the petitioner never agreed to his regulations and should not be held liable for the losses caused by him. *State* v. *Malvaney*, 221 Miss. 190, 72 So.2d 424 (1954); *Peerless Insurance Co.* v. *Cerny & Associates, Inc.*, U.S.D.C. Minn. 199 F. Supp. 951 (1961).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RODGER J. WALSH,
Floor Three,
Union National Bank Building,
Kansas City 6, Missouri,
Counsel for Petitioner.